Anika Insurance Brokers Sdn Bhd & Anor v Public Bank Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D1-22-891 OF 2002
VINCENT NG J
29 MARCH 2004

Civil Procedure — Striking out — Application to strike out action — Whether cause of action existed — Whether a principal-agent relationship exists between broker and insurance company — Privity of contract — Whether insurance company as undisclosed principal could sue and be sued — Contracts Act 1950 s 179

Civil Procedure — Summary judgment — Setting aside — Whether there were triable issues — Wrong conversion of cheques — Whether issues of contributory negligence to be resolved — Whether defence under s 85 of Bills of Exchange Act 1949 available

Contract — Privity — Agency — Whether a principal-agent relationship exists between broker and insurance company — Whether insurance company as undisclosed principal could sue and be sued — Contracts Act 1950 s 179

The first plaintiff was a reinsurance broker which acted as agents for the second plaintiff, an insurance company. Upon the first plaintiff's confirmation of the risks reinsured, the second plaintiff remitted payments to be made to Sorema SA (Labuan), another reinsurance company. The first plaintiff had issued three cheques to a representative of Sorema SA (Labuan), Lee Meng Pang. The first plaintiff later found out that the defendant had wrongfully credited the proceeds of the three cheques into the account of Sorema SA (Services). Sorema SA (Labuan) disavowed any knowledge or acceptance of risks on insurance policies undertaken by the second plaintiff. The plaintiffs alleged that the defendant wrongfully converted their cheques and sought a refund. The senior assistant registar allowed the plaintiffs' application for a summary judgment.

The defendant appealed against the said decision and sought for the following: (i) *vide* encl 16, to strike out the second plaintiff's claim on the ground that it had no reasonable cause of action; and (ii) *vide* encl 22, to set aside the summary judgment in that there were triable issues.

Held, dismissing defendant's application in encl 16 but allowing appeal under encl 22:

(1) In relation to encl 16, the second plaintiff's cause of action was sufficiently pleaded. The first plaintiff was acting as the second plaintiff's agent as it merely transmitted the moneys for the second plaintiff *vide* three cheques. There was privity of contract because the second plaintiff's right to commence this suit was derived from the principal-agent relationship between the plaintiffs, as provided for by s 179 of the Contracts Act. Furthermore, an undisclosed principal could sue and be sued on a contract, even though the name and even existence were undisclosed (see paras 10 and 11).

(2) Regarding encl 22, the facts indicated that there were triable issues in ascertaining whether the first plaintiff had negligently contributed to their losses, *inter alia*, by handing over the cheques to Lee Meng Pang who ceased to be an employee of Sorema SA (Labuan). In addition, there was also the issue of vicarious liability on the part of the first plaintiff to be considered at trial. The defendant might also succeed at the trial by invoking s 85 of the Bills of Exchange Act 1949 as a statutory protection where a bank had acted in good faith and without negligence (see paras 24, 25 and 27).

[Bahasa Malaysia summary

Plaintif pertama adalah broker insuran semula yang berlaku sebagai agen plaintif kedua, sebuah syarikat insurans. Selepas mendapat pengesahan terhadap risiko menginsuranskan semula, plaintif kedua mengirimkan bayaran untuk Sorema SA(Labuan), sebuah syarikat insurans semula yang lain. Plaintif pertama mengeluarkan tiga cek kepada Lee Meng Pang, wakil Sorema SA (Labuan). Kemudiannya, plaintif pertama mendapat tahu bahawa pihak defendan telah mengkreditkan hasil ketiga-tiga cek dengan salah ke dalam akaun Sorema SA (Services). Sorema SA (Labuan) menafikan bahawa mereka mempunyai pengetahuan atau menerima risiko terhadap polisi insurans yang diakujanji oleh plaintif kedua. Kedua-dua plaintif menyatakan bahawa pihak defendan telah menukar cek mereka secara salah lalu menuntut bayaran balik. Penolong kanan pendaftar telah membenarkan permohonan pihak plaintif untuk penghakiman terus.

Pihak defendan membuat rayuan terhadap keputusan penolong kanan pendaftar ('PKP') dan memohon: (i) melalui lampiran 16, untuk membatalkan tuntutan plaintif kedua atas ia tidak mempunyai kausa tindakan yang munasabah; dan (ii) melalui lampiran 22, untuk mengetepikan penghakiman terus atas alasan terdapat isu-isu yang perlu dibicarakan.

Diputuskan, menolak permohonan defendan dalam lampiran 16 tetapi membenarkan di bawah lampiran 22:

(1) Berkaitan dengan lampiran 16, pliding plaintif kedua telah sewajarnya disempurnakan. Plaintif pertama telah bertindak sebagai agen kepada plaintif kedua kerana ia hanya menghantar wang untuk plaintif kedua menerusi tiga cek. Terdapat priviti kontrak kerana hak plaintif kedua untuk memulakan guaman sivil wujud dari hubungan kedua-dua plaintif sebagai prinsipal dan ejen, yang diperuntukkan di bawah s 179 Akta Kontrak. Tambahan pula, prinsipal yang tidak didedahkan masih boleh mendakwa dan didakwa dalam kontrak, walaupun nama dan kewujudannya tidak disebut (lihat perenggan 10 dan 11).

(2) Berhubung lampiran 22, fakta-fakta menunjukkan bahawa terdapat isu-isu yang harus dibicarakan dalam menentukan sama ada plaintif pertama didapati turut cuai kepada kerugian, antara lain, semasa penyerahan cek-cek tersebut kepada Lee Meng Pang yang bukan lagi

merupakan pekerja Sorema SA (Labuan) pada 12 Julai 2001. Tambahan pula, terdapat isu liabiliti vikarius terhadap plaintif pertama yang perlu dipertimbangkan semasa perbicaraan. Defendan juga boleh berjaya semasa perbicaraan dengan menggunakan s 85 Akta Bil Pertukaran 1949 sebagai perlindungan statutori jika bank bertindak dengan suci hati dan tanpa kecuaian (lihat perenggan 24, 25 dan 27).]

Notes

For cases on striking out of pleadings, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) para 4893.
For cases on setting aside of summary judgments, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 6065 – 6072
For cases on privity of contract involving agencies, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4053 – 4054
For striking out pleadings and actions see 1 *Halsbury's Laws of Malaysia* (2002 Reissue) para [10.6-069].
For cases on summary judgments, see 1 *Halsbury's Laws of Malaysia* (2002 Reissue) paras [10.6-048]–[10.6-057].

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36 (refd)
Holt v Ely [1853] 1 E & B 794 (refd)
Langton v Waite [1868] LR 6 Eq 165 (refd)
Suppuletchimi v Palmco Bina Sdn Bhd [1994] 2 MLJ 368 (refd)
Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd [1968] 2 All ER 886 (refd)
Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1 (refd)
Yap Moi v Hong Leong Bank Bhd [2002] 1 MLJ 614 (distd)

Legislation referred to

Bills of Exchange Act 1949 s 85
Contracts Act 1950 s 179
Courts of Judicature Act 1964 s 68(1)
Rules of the High Court 1980 O 14 O 18 r 19(1)(a)

Christene Tee (Raja Eleena Siew Ang & Assoc) for the appellant/defendant.
Shaikh Abdul Saleem (Anad & Noraini) for the respondents/plaintiffs.

Vincent Ng J:

PREAMBLE

[1] Before are the defendant's appeals, namely:

(i) Enclosure 16 — against the decision of the learned senior assistant registrar ('SAR') dated 5 November 2002, dismissing their application

A to strike out the second plaintiff's claim against them under O 18 r 19(1)(a) of the Rules of the High Court 1980 ('the RHC'); and

(ii) Enclosure 22 — against the decision of the learned SAR dated 7 March 2003, allowing the plaintiffs' application for summary judgment under O 14 of the RHC.

B

BACKGROUND FACTS

[2] The first plaintiff, a reinsurance broker, acted as agents for the second plaintiff, an insurance company. As the second plaintiff's agent, the first plaintiff was entrusted to place out risks on insurance policies C undertaken by the second plaintiff to other reinsurers. One such reinsurer was Sorema SA (Labuan). Upon the first plaintiff's confirmation that the risks have been reinsured, the second plaintiff would remit the necessary premium payments to the first plaintiff. The first plaintiff, in turn, would forward the said premium payments to the reinsurers after deducting commission due to themselves.

D

[3] In the course of their normal business and on the second plaintiff's instructions, the first plaintiff issued three cheques for a total of RM1,687,883.64 in favour of Sorema SA (Labuan). The cheques were handed over to one Lee Meng Pang, a purported representative of Sorema SA (Labuan).

E

[4] The first plaintiff subsequently discovered that the defendant had wrongfully credited the proceeds of the three cheques into Sorema SA (Services)'s account. Sorema SA (Labuan) disavowed any knowledge or acceptance of risks on insurance policies undertaken by the second plaintiff.

F **[5]** The plaintiffs alleged that the defendant wrongfully converted their cheques and were seeking a refund.

The First Appeal

[6] The defendant sought to strike out the second plaintiff's claim on the G grounds that the second plaintiff had no reasonable cause of action against them as the statement of claim was bereft of any particulars pertaining to their liability to the second plaintiff.

[7] The defendant maintained that as the second plaintiff was neither the true owner of the cheques nor their customer, there was no privity of H contract between them and as the undisclosed principal of the first plaintiff, the second plaintiff could not sustain any claim against the defendant.

[8] This defendant's application called for a careful perusal of the plaintiffs' amended statement of claim. After identifying and describing the plaintiffs individually, the relevant paragraphs in the pleadings read as I follows:

> 3 The first plaintiff was at all material times a reinsurance broker acting on behalf of the second plaintiff in reinsurance transactions ...

6 The first plaintiff was entrusted by the second plaintiff to place out the risks ... A

7 ... *the second plaintiff remitted* to the first plaintiff *the necessary premium payments* ... for the first plaintiff's onward transmission ... .

8 The first plaintiff, as instructed by the second plaintiff, drew the cheques ...

10 ... the second plaintiff ... were told by Sorema that Sorema did not have any knowledge of the said risks and therefore they disavowed acceptance of the risks B ...

11 ... the second plaintiff was forced to place out the risks ...

12 In the premises, the defendant has converted the cheques ... *the first and second plaintiffs have suffered damage.*

C

14 *The first and second plaintiffs have suffered losses* as a result of the defendant's negligence ...

(Emphasis added)

[9] Reading the pleadings in its entirety, I find that the second plaintiff's cause of action is sufficiently pleaded as a claim under the tort of conversion D and for moneys had and received. There is no doubt that the first plaintiff was acting as the second plaintiff's agent and that the moneys paid out for the premiums were actually from the second plaintiff. The first plaintiff merely transmitted the moneys for the second plaintiff, *vide* the three cheques.

[10] The question of lack of privity of contract between the second E plaintiff and the defendant does not arise because the second plaintiff's right to commence this suit is derived from the principal-agent relationship between the plaintiffs. Section 179 of the Contracts Act 1950 recognizes this right for the section provides:

> Contracts entered into through an agent, and obligations arising from acts done F by an agent, may be enforced in the same manner and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.

[11] In *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd* [1968] 2 All ER 886 at p 889 Lord Denning MR held that: G

> It is a well-established rule of English law that an undisclosed principal can sue and be sued on a contract, even though his name and even his existence are undisclosed ...

This view was supported by Lord Diplock LJ:

> Where an agent ... enters into a contract with another party intending to do so on H behalf of his principal, it matters not whether he discloses to the other party the identity of his principal, or even that he is contracting on behalf of a principal at all. ...

and echoed by Lord Sachs LJ:

> ... a principal can always step in and enforce the contract if his name was I unmentioned or even his existence was undisclosed at the time the contract was made.

A (See *Holt v Ely* [1853] 1 E & B 794 and *Langton v Waite* [1868] LR 6 Eq 165.)

Conclusion

B **[12]** The principles relating to striking out applications are well settled (see *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 and *Suppuletchimi v Palmco Bina Sdn Bhd* [1994] 2 MLJ 368).

C **[13]** My perusal of the statement of claim reveals that there is nothing in the statement of claim that lends credence to the defendant's allegation that the second plaintiff's claim is obviously unsustainable. In *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1 (PC), Lord Diplock had warned that:

> The power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost of care.

D **[14]** Bearing his advice in mind, I decided to dismiss the defendant's appeal in encl 16 with costs.

The Second Appeal

E **[15]** All three cheques made out by the first plaintiff were in favour of Sorema SA (Labuan) and were marked 'Non-negotiable', endorsed 'Account payee only' and had the word 'bearer' crossed out.

[16] The plaintiffs made heavy weather of the Court of Appeal case of *Yap Moi v Hong Leong Bank Bhd* [2002] 1 MLJ 614 to drive home the point that the defendant's defence did not raise any triable issues.

F **[17]** In *Yap Moi*, Faiza Thamby Chik J delivering the judgment of the court held at p 618 that:

> I am of the view that the respondent (the Bank) acted contrary to all known and accepted norms in blatantly disregarding the endorsement 'account payee only', G 'not negotiable' and the cancellation of 'or bearer/atau pembawa'. *In the circumstances*, the respondent bank acted in reckless disregard of the clear mandate to the loss and detriment of the named payee and true owner.
>
> (Emphasis added)

H **[18]** I am completely *ad idem* with my learned brother. Although the plaintiffs took great pains to emphasize that the facts in *Yap Moi* were on all fours with the present case, I cannot agree.

[19] The striking similarity is of course the fact that all the cheques that were the subject matter of the conversion in *Yap Moi*, as in the present case, were marked 'Non-negotiable', endorsed 'Account payee only' and had the word 'bearer' crossed out. Despite these precautions, one Ng Hong Chai who came into possession of all the cheques without the knowledge, consent or authority of *Yap Moi*, was able to bank in the cheques into his account.

[20] The material difference between these two cases is that in *Yap Moi*, the Court of Appeal found as a fact that two bank employees colluded with Ng Hong Chai and facilitated the conversion of the cheques. These crucially adverse facts led the Court of Appeal to hold that the bank could not rely on s 85 of the Bills of Exchange Act 1949 ('the Act') for any protection.

[21] The statutory protection, which is sparingly accorded, requires the satisfaction of two conditions precedent, namely that the bank had to have acted in good faith and without negligence.

[22] In the present case, there were no allegations of collusion by the defendant. The villain in this tale seems to be Lee Meng Pang, to whom the first plaintiff handed over the three cheques. Although the plaintiffs sought to downplay his role in this case to that of a mere postman, I am troubled because the defendant has maintained that Lee Meng Pang had contributed to the circumstances that led to the three cheques being converted. At the material time, the three cheques were handed over to him, sometime between 30 October to 8 November 2001, Lee Meng Pang was no longer an employee of the Singapore branch of Sorema SA (Labuan). In fact, he has ceased to be an employee as of 12 July 2001.

[23] Despite this, the defendant alleged that the first plaintiff and several other reinsurance brokers had continued placing out risks on insurance policies to Sorema SA (Labuan) through Lee Meng Pang and sometimes the premium payments by way of cheques have been made out to Sorema SA (Services).

[24] These circumstances, I believe, raises the question of whether by continuing to transact through Lee Meng Pang, the first plaintiff had negligently contributed to their own losses. Alternatively, whether Lee Meng Pang was acting as the first plaintiff's agent in transacting with the defendant, thus making the first plaintiff vicariously liable for their losses. Furthermore, besides the issue of contributory negligence, the defendant may in all probability succeed at the trial in invoking s 85 of the Act, considering that they have tendered in affidavit evidence as aforesaid, the circumstances in which the said cheques were paid out. Section 85 reads as follows:

> 85 Protection of bankers collecting payment of cheques, or certain other instruments.
>
> (1) Where a banker, in good faith and without negligence —
>
> (a) receives payment for a customer of an instrument to which this section applies; or
>
> (b) having credited a customer's account with the amount of such an instrument, receives payment thereof for himself;
>
> and the customer has no title, or a defective title, to the instrument, the banker does not incur any liability to the true owner of the instrument by reason only of having received payment thereof.
>
> (2) This section applies to the following instruments, namely —

A (a) cheques;

(b) any document issued by a customer of a banker which, though not a bill of exchange, is intended to enable a person to obtain payment from that banker of the sum mentioned in the document;

(c) any draft payable on demand drawn by a banker upon himself, whether payable at the head office or some other office of his bank.

B (3) A banker is not to be treated for the purposes of this section as having been negligent by reason only of his failure to concern himself with absence of, or irregularity in, indorsement or an instrument.

Conclusion

C **[25]** The defendant has consistently maintained that they acted in good faith and without negligence and the onus of proving so, falls on them. In light of the circumstances set out above, I am of the opinion that the defendant must be given an opportunity to discharge this burden in the course of a full trial.

D **[26]** After careful consideration of all five affidavits and the submissions put in by both sides, I decided to allow the defendant's appeal in encl 22 with costs. The learned SAR's order allowing the plaintiffs' application for summary judgment is hereby set aside.

E POSTSCRIPTUM

[27] Instead of appealing against the decision on these two enclosures, both parties should have focused their efforts on getting up the matter for trial, as, under the proposed amendments to s 68(1) of the Courts of Judicature Act 1964 (of which I am a member of the sub-committee) such decisions would become non-appealable to the Court of Appeal.

F *Defendant's appeal to set aside application for summary judgment allowed with costs but application to strike out action dismissed with costs.*

Reported by Jeyanthi Mala

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